Supreme Court, U.S.
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No. 02-120

IN THE

Supreme Court of the United States

GARY MILLBROOK,

Petitioner,

v.

IBP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In an employment discrimination case, can a jury verdict for a plaintiff who claims to have been denied a promotion because of his race be upheld when (i) the plaintiff has presented no direct or circumstantial evidence of intentional racial discrimination other than his allegedly superior qualifications, and (ii) the disparity between his qualifications and those of the selected candidate is not so favorable to him that there can be no dispute among reasonable persons of impartial judgment that he was clearly better qualified and, hence, there is no basis for finding that the employer's assertion that it selected the candidate it believed to be the better candidate is a lie and a pretext for unlawful discrimination?

CORPORATE DISCLOSURE STATEMENT

Respondent IBP, inc. is a wholly owned subsidiary of Tyson Foods, Inc., a publicly held company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	10
I. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT	10
II. THE DECISION BELOW IS NOT IN CONFLICT WITH A DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS	17
III. THE DECISION BELOW IS CONSISTENT WITH THE PURPOSES AND POLICIES OF THE FEDERAL EQUAL EMPLOYMENT OPPORTUNITY STATUTES	22
CONCLUSION	26

TABLE OF CITED AUTHORITIES

CASES *Page*

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) 7

Anderson v. Bessemer City, 470 U.S. 564 (1985) .. 12

Byrnie v. Town of Cromwell Pub. Schs., 243 F.3d 93 (2d Cir. 2001) 7

Chock v. Northwest Airlines, 113 F.3d 861 (8th Cir. 1997) 19, 20

Deines v. Texas Dept. of Protective & Regulatory Servs., 164 F.3d 277 (5th Cir. 1999) 18

Denney v. City of Albany, 247 F.3d 1172 (11th Cir. 2001) 6, 18

Fischbach v. District of Columbia Dept. of Corrections, 86 F.3d 1180 (D.C. Cir. 1996) 17

Guerrero v. Ashcroft, 253 F.3d 309 (7th Cir. 2001) 6

Hase v. Missouri Div. of Employment Sec., 972 F.2d 893 (8th Cir. 1992), *cert. denied*, 508 U.S. 906 (1993) 19, 20

Jordan v. Summers, 205 F.3d 337 (7th Cir. 2000) .. 5

Cited Authorities

Page

Lehman v. Prudential Ins. Co. of Am., 74 F.3d 323 (1st Cir. 1996) 17

Lidge-Myrtil v. Deere & Co., 49 F.3d 1308 (8th Cir. 1995) 20

Lieberman v. Gant, 630 F.2d 60 (2d Cir. 1980) .. 11, 12, 13

Lindale v. Tokheim Corp., 145 F.3d 953 (7th Cir. 1998) 6

Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979) 11

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

Odima v. Westin Tucson Hotel Co., 991 F.2d 595 (9th Cir. 1993) 20, 21

Olsen v. Marshall & Ilsley Corp., 267 F.3d 597 (7th Cir. 2001) 7

Ost v. West Suburban Travelers Limousine, Inc., 88 F.3d 435 (7th Cir. 1996) 7

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 14, 18, 24

Pierce v. Marsh, 859 F.2d 601 (8th Cir. 1988) 20

Cited Authorities

Page

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 9, 15, 16

Ruiz v. Posadas de San Juan Assocs., 124 F.3d 243 (1st Cir. 1997) 17

Russell v. Acme-Evans Co., 51 F.3d 64 (7th Cir. 1995) 5

Ryther v. KARE 11, 108 F.3d 832 (8th Cir.) (*en banc*), *cert. denied*, 521 U.S. 1119 (1997) 19

Seaman v. Coplay Cement Co., 26 F.3d 428 (3d Cir. 1994) 21

Simms v. Oklahoma ex rel. Dept. of Mental Health & Substance Abuse Servs., 165 F.3d 1321 (10th Cir.), *cert. denied*, 528 U.S. 815 (1999) 7, 17, 23

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 11, 23, 24, 25

United States Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983) 13, 14

United Steelworkers v. Weber, 443 U.S. 193 (1979) 22

Cited Authorities

Page

STATUTES AND RULES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 3, 22

42 U.S.C. § 1981 ..... 3, 22

42 U.S.C. § 2000e-2(j) 22

S. Ct. Rule 10 10

RESPONDENT'S BRIEF IN OPPOSITION

Respondent IBP, inc. ("IBP') hereby opposes the petition for a writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

IBP operates a meat processing plant in Joslin, Illinois. As a meat processor, IBP is regulated by the United States Department of Agriculture. Petitioner Gary Millbrook, an African-American, was hired by IBP as a janitor at the Joslin plant in November 1995.

IBP employs 40 Quality Control Inspectors at Joslin. Tr. 60-61. The QC Inspectors are in charge of inspecting the plant's end-products, assuring that they meet the standards of the USDA, IBP, and IBP's customers. QC Inspectors are responsible for completing the paperwork required by the USDA. Tr. 214. They also have responsibility for communicating with IBP production supervisors concerning issues of product quality. Tr. 24-25. As a result, it is not uncommon for there to be confrontations between the QC Inspectors and production supervisors. Tr. 64.

IBP has established certain minimum requirements for applicants for the QC Inspector position. Candidates are required to possess good mathematical skills, good communications skills, safety awareness, good judgment, and the ability to work with others in a management support role. Tr. 278. Candidates are preferred who have college studies in animal science, previous quality control experience, and/or knowledge of processing/carcass operations. The main criteria that IBP applies in assessing candidates are their safety consciousness, their ability to communicate effectively. and their attendance records. Tr. 13-14, 31. IBP selects the most qualified of the candidates

based on the information contained in their resumes or applications and their performance during an interview with the hiring supervisor. Tr. 52, 214-15, 221-22.

Between 1996 and 1998, Millbrook applied for ten vacant QC Inspector positions. He had worked solely as a janitor for IBP since November 1995 (Tr. 86) and had not held any production or floor positions there. Tr. 155. Prior to working for IBP, he had served as chief custodian at Black Hawk College. Tr. 85. During the 1960s (long before new USDA quality standards were implemented (Tr. 65, 217)), he had worked in a variety of jobs for another meat packer for nine months, but none of those positions involved quality control responsibilities. Tr. 92. His attendance record at IBP was good (Tr. 97) and he had a perfect safety record (*ibid.*), but he had not been recognized by IBP for any safety or other awards. Tr. 165. Millbrook had a college degree in education and liberal arts (Tr. 85), but he had not taken any animal science or quality control courses. Tr. 145. He was not selected for any of the ten QC Inspector positions.

One of the QC Inspector positions for which Millbrook applied was awarded to DeWayne Harris, an external candidate. Harris had not worked at IBP and had not worked with cattle or beef. Tr. 207. While he did not have a college degree, he had taken courses in quality management (Tr. 207) and had prior quality control work experience while serving in the military. Tr. 208. In addition, he had demonstrated leadership skills while serving as a sergeant and platoon leader in the Air Force. Tr. 224. Finally, he had received the "Communicator of the Year" award from the Air Force in 1995. Tr. 223.

Audrey Jordan, one of IBP's two Quality Control Supervisors, made the decision to award the QC Inspector position to Harris rather than Millbrook. Tr. 205. She interviewed both men. Based on Millbrook's interview, she did not believe "he would have what it takes to put up with the confrontation,

the intimidation that the production supervisors or upper management would give a quality assurance inspector in various aspects of their job." Tr. 216. Millbrook had a difficult time looking at her while he answered her questions, and he did not seem confident in his answers. Tr. 241. She selected Harris because he had previous experience in quality control, had taken courses in quality management, and had received the Communicator of the Year Award. Tr. 224. Harris was very energetic and demonstrated self-confidence during the interview. Jordan concluded that he could handle the pressures of the position, particularly the confrontations that occur between productions supervisors and quality assurance. Tr. 223. Ultimately, she concluded that Harris was the more qualified candidate for the position. Tr. 224.[1]

Millbrook filed suit against IBP on November 30, 1998, alleging that he had been denied eight of the ten QC Inspector positions because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981.[2] At the conclusion of a three-day trial, the

1. Millbrook's only testimony comparing his qualifications with those of Harris came in response to two questions asked by his counsel:

> Q And did you know whether or not Mr. Harris was an employee of IBP prior to him being offered this position?
>
> A He was not.
>
> Q You believe you were more qualified than he was?
>
> A I believe that to be true.

Tr. 105. On cross-examination, he acknowledged that he did not know what Harris' qualifications were. Tr. 163. As the Seventh Circuit observed, fewer than five of the 443 pages of the trial transcript dealt with IBP's selection of Harris over Millbrook. Pet. App. 26a.

2. Millbrook acknowledged at trial that the successful candidates for two of the ten positions he had sought had been more qualified than he. Tr. 90.

jury returned a verdict finding that IBP had not discriminated against Millbrook in filling seven of the positions but finding in favor of Millbrook in connection with the selection of Harris. Pet. App. 37a. The jury awarded Millbrook $25,000 in back pay, $7,500 for emotional distress, and punitive damages of $100,000. Pet. App. 35a. The district court denied IBP's motions for judgment as a matter of law and for a new trial (Pet. App. 40a) and ordered IBP to promote Millbrook to QC Inspector when the position next became vacant, paying him at the level of the QC Inspector position in the meantime.

IBP filed a timely appeal to the United States Court of Appeals for the Seventh Circuit.[3] On February 20, 2002, a panel of the Seventh Circuit reversed the judgment in favor of Millbrook, one judge dissenting.

At the outset of its opinion, the appellate court observed that the sole issue on appeal was whether sufficient evidence had supported the jury's finding that IBP intentionally had discriminated against Millbrook on the basis of his race when it chose Harris, rather than him, for the QC Inspector position. Pet. App. 5a. Millbrook did not contend that he had presented any direct evidence of a discriminatory motivation; accordingly, he relied solely on the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework. Pet. App. 6a. As the appellate court noted, there was no dispute that Millbrook had made out a *prima facie* case of race discrimination or that IBP had articulated a legitimate, nondiscriminatory explanation for its selection of Harris — its determination that Harris was the better-qualified candidate. Pet. App. 7a. Accordingly, the court turned its attention to the evidence supporting Millbrook's assertion that IBP's stated reason was false, *i.e.*, pretextual. *Ibid.*

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3. Millbrook did not cross-appeal from the jury's findings in IBP's favor on seven of the eight promotions he had sought.

"Pretext," the Seventh Circuit explained, "'means a lie, specifically a phony reason for some action.'" Pet. App. 8a, *quoting Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995). "Thus, even if IBP's reasons for selecting Harris over Millbrook were 'mistaken, ill considered or foolish, so long as [the employer] honestly believed those reasons, pretext has not been shown.'" Pet. App. 8a-9a, *quoting Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000).

The court then examined the evidence concerning whether IBP's explanation for selecting Harris was a lie. The Seventh Circuit rejected various arguments offered by Millbrook in support of this conclusion — that IBP had provided a different explanation at trial for Harris' selection than it had during the interview process (the Seventh Circuit found no supporting evidence), that Harris had not submitted a resume in connection with his candidacy (instead, like all external candidates, he had completed a more extensive application form), that Jordan had made allegedly "negative subjective comments . . . regarding other African-American applicants" (Pet. App. 10a) (the court observed that the statements were all "race neutral"), and that during 1996 and 1997 Jordan had not hired any blacks as QC Inspectors (Millbrook had failed to present evidence concerning the number of positions filled during those years or the racial makeup of the candidate pools) — as failing to create a reasonable inference that IBP had lied concerning its reasons for selecting Harris. Pet. App. 9a-13a.

The court then considered Millbrook's sole remaining argument: that it was appropriate for the jury to compare his qualifications with those of Harris and that the jurors "could easily have concluded" that Millbrook was the more qualified candidate. Pet. App. 13a. The Seventh Circuit reviewed the evidence concerning the differing qualifications possessed by the candidates and concluded, "What we have here then are

two qualified applicants with varying credentials, and different views as to which candidate is best for the job." Pet. App. 14a. The court summarized Millbrook's argument as follows: "[W]hen an employer asserts that it chose another applicant over the plaintiff because the selected candidate was more qualified, the jury may return a verdict of discrimination if, after reviewing the applicants' relative qualifications, it simply does not believe the employer's assertion." *Ibid.*

The court rejected Millbrook's contention that a mere dispute over the assessment of competing candidate qualifications, by itself, can support an inference of a discriminatory motivation: "[A]bsent such additional evidence of discrimination [beyond the relative qualifications of the candidates], this court has held that a jury verdict for the employee cannot stand if the jury is simply disagreeing with the company as to who is best qualified." Pet. App. 16a, *citing Lindale v. Tokheim Corp.*, 145 F.3d 953 (7th Cir. 1998), and *Guerrero v. Ashcroft*, 253 F.3d 309 (7th Cir. 2001). The Seventh Circuit observed that the Second, Fifth, Tenth, Eleventh, and D.C. Circuits had similarly so held (Pet. App. 18a-20a) and adopted as its holding the standard articulated by those courts:

> [W]here an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext "unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." *Deines[v. Texas Dept. of Protective & Regulatory Servs.]*, 164 F.3d [277] at 279 [(5th Cir. 1999)]. In other words, "[i]n effect, the plaintiff's credentials would have

> to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" *Byrnie [v. Town of Cromwell Pub. Schs.*], 243 F.3d [93] at 103 [(2d Cir. 2001)] (quoting *Deines*, 164 F.3d at 280-81).

Pet. App. 20a-21a.

The Seventh Circuit found this standard to be consistent with the underlying purposes of the federal discrimination laws.

> [A] court's "role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second-guesses employers' business judgments." *Simms[v. Oklahoma ex rel. Department of Mental Health & Substance Abuse Servs.*,] 165 F.3d [1321] at 1330 [10th Cir. 1999]. . . . If we were to allow a jury to evaluate competing credentials to determine whether the employer's assertion that it selected the best candidate was pretextual, the jury would in most cases be replacing the employer's personnel department.

Pet. App. 21a. The court also observed that this standard was consistent with admonitions in its prior decisions that a discrimination plaintiff cannot support a claim solely with the plaintiff's own opinions of his/her work performance or qualifications (*citing Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996)) or the opinions of a co-worker (*citing Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994)). Pet. App. 21a-22a. "'[W]ithout proof of a lie [as to what the employer believed] no inference of discriminatory motive can be drawn.'" Pet. App. 22a, *quoting Olsen v. Marshall*

& Ilsley Corp., 267 F.3d 597, 602 (7th Cir. 2001). Thus, the court concluded, "without some affirmative evidence calling into question IBP's credibility, Millbrook must lose." Pet. App. 23a.

The Seventh Circuit found that, in relying solely on the differences between his qualifications and those of Harris,[4] Millbrook had failed to carry his ultimate burden of proving that IBP had selected Harris instead of him because of his race:

> While Millbrook believes the jury should be allowed to review the candidates' relative qualifications to

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4. As the Seventh Circuit summarized those differences:

> [W]e note initially that it is a close question as to whether Millbrook's qualifications are equivalent to or exceed those of Harris. While Millbrook had a college education, his degree was in an unrelated field, education, and Harris had completed some college course work in the relevant area of management. Harris also had experience in quality control, whereas Millbrook did not. Harris' tour of duty with the military is also a credential highly valued by many employers because of the discipline, respect, work ethic, and many other valuable virtues military service instills. And, during his time with the Air Force, Harris demonstrated his communication skills, as documented by his Communicator of the Year Award. IBP explained that it sought out candidates with such qualifications because Quality Control Inspectors must possess superior communication skills given the confrontational nature of the position. But, even assuming that Millbrook was better qualified than Harris, his credentials were not clearly superior, and therefore a reasonable employer could have concluded that Harris was the better person for the job. Accordingly, a comparison of the relative qualifications of Millbrook and Harris is by itself not probative of pretext.

Pet. App. 23a-24a.

> decide whether or not IBP lied, without any evidence calling into question IBP's veracity, what this case really comes down to is the jury deciding which applicant is more qualified. But believing or not believing the decisionmaker is simply saying that the employer made the wrong choice — which is not illegal. Because there is no evidence of pretext, Millbrook has failed to create an inference that IBP intentionally discriminated against him by hiring Harris.

Pet. App. 25a.

Alternatively, the court ruled that, even assuming that Millbrook had presented evidence of pretext, "at best 'he created only a weak issue of fact as to whether the employer's reason was untrue.'" Pet. App. 26a, *quoting Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000). The appellate court reviewed the trial court record and found that

> [t]here is absolutely no other evidence of intentional discrimination — not one racist comment, nor any harassment. . . . In short, Millbrook has no proof that IBP denied him a promotion because of his race. The case he presented is simply not enough under *Reeves* to sustain a jury verdict in his favor, even if some evidence of pretext had existed.

Pet. App. 26a.[5]

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5. One judge (Evans, J.) dissented. Judge Evans would have deferred to the jury verdict, explaining, "[I]n the close case, as this one indisputably is, the jury's judgment should be respected unless no reasonable person could have found as it did." Pet. App. 31a.

Millbrook's timely petition for rehearing and suggestion for rehearing *en banc* were denied on April 19, 2002.[6]

REASONS FOR DENYING THE WRIT

The Seventh Circuit's holding — that a jury verdict for a discrimination plaintiff cannot stand when the plaintiff has presented no direct or circumstantial evidence of intentional promotion discrimination other than his allegedly superior qualifications, unless the disparity between his qualifications and those of the selected candidate is so great as to permit an inference that the employer's claim to have selected the better candidate is false and, hence, a pretext for discrimination — is consistent with the decisions of this Court, decisions from other appellate courts, and the underlying purposes of our nation's equal employment opportunity statutes. The decision below was simply a routine application of well-settled standards to the unique facts in this case. Accordingly, there is no compelling reason for the Court to grant Millbrook's petition, which should be denied. S. Ct. Rule 10.

I. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner asserts that the decision below is inconsistent with twenty years of precedent from this Court authorizing a plaintiff to rely on evidence of allegedly superior qualifications in support of a claim of hiring or promotion discrimination because the trier of fact may "disbelieve an employer's assertion that it rejected the plaintiff because he or she was less qualified, and . . . conclude that the proffered explanation was a pretext for discrimination." Petition at 5. Petitioner asserts that the

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6. A majority of the active circuit judges voted not to rehear the case *en banc*. Five judges would have granted such rehearing. Pet. App. 38a-39a.

Seventh Circuit decision, and those from the circuits on which it relied, "have severely limited this method of proof" in a manner inconsistent with this Court's decisions. *Ibid.* This is not correct. None of this Court's decisions authorizes a finding of intentional discrimination based solely on the evidence submitted by Petitioner in this case — evidence that the plaintiff's qualifications simply differed from, but were not manifestly superior to, those of the successful candidate.

On several prior occasions this Court has recognized — consistent with the holding below — that disparities in qualifications *may*, together with other direct or indirect evidence of a discriminatory motivation, support a finding of intentional discrimination in an appropriate case. For example, in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981), the Court observed that "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this *may* be probative of whether the employer's reasons are pretexts for discrimination." (Emphasis added.) But this Court did not rule that *any* difference in qualifications between the plaintiff and the successful candidate would support a finding of discrimination, only that evidence that the employer had misjudged those qualifications "may" permit such a finding in an appropriate, but undefined, set of circumstances.[7]

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7. This Court approvingly cited *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), and *Lieberman v. Gant*, 630 F.2d 60 (2d Cir. 1980), in support of this aspect of its *Burdine* decision. *See* 450 U.S. at 259. Both support the Seventh Circuit's conclusion that a jury's mere disagreement with an employer's assessment of the candidates' relative qualifications, by itself, cannot support a finding of discrimination absent such a significant disparity as to call into question the employer's veracity. *See Loeb*, 600 F.2d at 1012 n.6 ("The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one. The jury must understand that its focus is to be on the (Cont'd)

In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), this Court also considered a hiring discrimination claim in which comparative qualifications evidence had played a role. In reversing a circuit court decision that had set aside a judgment for the plaintiff, this Court observed that the plaintiff had produced direct evidence that the male members of the selection committee had been biased against her because she was a woman and evidence that she had been asked questions during the selection process that had not been asked of male candidates. *Id.* at 569. In addition, this Court noted that the district court's finding of pretext had been based on the fact that the selection committee members had been inconsistent in the weight they gave experience and education in evaluating male candidates. *Id.* at 570. To be sure, this Court acknowledged that the district court also had found that the plaintiff was "better qualified" than the successful male candidate to perform the duties required of the position based on her prior employment and community experience. *Id.* at 568-69.[8] But, nothing in this Court's decision

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(Cont'd)
employer's motivation, however, and not on its business judgment."); *Lieberman*, 630 F.2d at 65 (plaintiff can demonstrate pretext by "show[ing] that the asserted neutral basis was so ridden with error that defendant could not honestly have relied upon it").

8. The plaintiff's qualifications for the position of Recreation Director (college degrees in social studies and education, years of experience as a classroom teacher responsible for supervising children in recreational and athletic activities, employment as a hospital recreation director, extensive involvement in a variety of civic organizations, knowledge of sports as a high school athlete and as a mother of children involved in organized athletics, skills as a public speaker, experience in handling money, and knowledge of music, dance, and crafts (470 U.S. at 568-69)) were so superior to those of the 24-year-old male selected for the position, who had just recently graduated from college with a physical education degree (*id.* at 567), that "no reasonable employer could believe that it [had] selected the best candidate," in the words of the standard applied by the Seventh Circuit in the instant case. Pet. App. 29a.

suggests that the Court necessarily would have reached the same decision solely based on the comparative qualifications evidence in the absence of the express findings by the district court, fully supported by the evidence, that "the committee had been biased against hiring a woman, and that the committee's explanations for its choice of Mr. Kincaid were pretextual[.]" *Id.* at 570. *See also id.* at 580 ("The District Court's findings regarding petitioner's superior qualifications *and the bias of the selection committee* are sufficient to support the inference that petitioner was denied the position of Recreation Director on account of her sex."). (Emphasis added.)

Nor is there a conflict between the decision below and *United States Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711 (1983).[9] As in *Anderson*, the plaintiff claiming promotion discrimination in *Aikens* had introduced direct evidence of the discriminatory animus of the decisionmaker, who had made "numerous derogatory comments about blacks in general and Aikens in particular." *Id.* at 713 n.2. This Court concluded that, if the district court on remand were to find discrimination based on such evidence, coupled with the evidence of a manifest disparity between the plaintiff's qualifications and those of the promoted whites,[10] "we do not believe that this would be

9. Petitioner incorrectly describes *Aikens* as a case in which this Court concluded that a finding of discrimination would be upheld. Petition at 8. In truth, there had been no such "finding." The plaintiff's racial discrimination claims had been dismissed by the district court following a bench trial. The court of appeals had reversed the district court's judgment. This Court concluded that the court of appeals had misinterpreted the burdens imposed under the *McDonnell Douglas* formula, vacated the court of appeals judgment, and remanded for trial. 460 U.S. at 717.

10. Aikens "had more supervisory seniority and training and development courses than all but one of the white persons who were (Cont'd)

reversible error." *Ibid.* Once again, nothing in *Aikens* remotely suggests that a finding of discrimination can be predicated solely on insubstantial differences in candidate qualifications.

Finally, the Seventh Circuit's decision is consistent with this Court's observation in *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989), that a plaintiff bringing a promotion discrimination claim "*might* seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position." (Emphasis added.) But, this Court emphasized, such evidence is not required for the plaintiff to prevail. "There are certainly other ways in which petitioner could seek to prove that respondent's reasons were pretextual." *Id.* at 188. Thus, this Court concluded that the district court had erred in instructing the jury that the plaintiff could carry her burden of persuasion only by showing that she was in fact better qualified than the white applicant who got the job. *Ibid.* As a result, in *Patterson* this Court had no need to, and did not, consider the nature or quantum of comparative qualification evidence that would suffice to support a finding of pretext and, hence, an inference of intentional discrimination.

In sum, none of this Court's prior decisions has held that evidence of insubstantial differences in the qualifications of the plaintiff and the successful candidate for hiring or promotion is sufficient, *by itself*, to support a finding of pretext, much less

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(Cont'd)
promoted above him. He has a Masters Degree and has completed three years of residence towards a Ph.D. Aikens had substantially more education than the white employees who were advanced ahead of him; of the 12, only two had any education beyond high school and none had a college degree." 460 U.S. at 713 n.2. As in *Anderson*, this wide disparity in qualifications may well have justified a finding of pretext under the Seventh Circuit's standard even in the absence of Aikens' direct evidence of unlawful animus.

an inference of intentional unlawful discrimination. Petitioner's broad assertion on page 7 of the Petition, that "[i]f . . . the trier of fact concludes that the employer selected the less qualified candidate, it may indeed infer that discrimination was the reason," finds no support in this Court's precedent.

Finally, Petitioner asserts that the Seventh Circuit's decision, as well as the uniform decisions of the other circuits on which it relied (*see* Section II, below), "recreate[s] the evidentiary scheme unanimously rejected by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)." Petition at 21. According to Petitioner, the Seventh Circuit's ruling "resurrects the requirement of direct evidence rejected in *Reeves*." *Id.* at 23. This is incorrect.

In *Reeves*, this Court ruled that a plaintiff, having succeeded in making out a prima facie case under the *McDonnell Douglas* standard and having introduced sufficient evidence to permit the trier of fact to find that the employer's articulated reason for the challenged employment action was false, is not required to produce any additional evidence that the employer's conduct was caused by intentional discrimination. "Thus, a plaintiff's prima facie case, combined with *sufficient evidence* to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer discriminated." 530 U.S. at 148 (emphasis added).

The question that the instant case presents, of course, is whether Petitioner's comparative qualification evidence — the only arguably probative evidence Petitioner presented that his race entered into IBP's selection of Harris — was "sufficient evidence" to permit the jury to find that IBP's reason for selecting Harris, rather than Petitioner, was false and, hence, a pretext for race discrimination. The primary holding of the court below is that, since Petitioner did not present evidence of qualifications that were so clearly superior to those of Harris

for the QC Inspector position that no reasonable person could have believed the latter to be the superior candidate, Petitioner did not present "sufficient evidence" to permit a finding that IBP's statement that it believed Harris to be the better candidate was false.

This Court explained in *Reeves* that

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, *the probative value of the proof that the employer's explanation is false*, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.

530 U.S. at 148-49 (emphasis added). In the instant case, the Seventh Circuit, applying a standard that has been adopted uniformly by the courts of appeals, ruled that Petitioner's comparative-qualifications evidence was lacking in probative value and, accordingly, that Petitioner's failure to adduce any other direct or circumstantial evidence that IBP's articulated reason for selecting Harris was false meant that the jury verdict could not stand because of insufficient evidence of intentional discrimination.

Petitioner's statement at page 23 of his Petition that the Seventh Circuit "insisted that the plaintiff adduce evidence of relevant derogatory remarks" is false and is based on a plain misreading of the decision below. Nowhere in its opinion did the Seventh Circuit rule, contrary to *Reeves*, that to submit the case to the jury a plaintiff who has made out a prima facie case *and* who has produced sufficient probative evidence that the employer's explanation is false must also produce direct evidence of discrimination, much less evidence of racially

derogatory remarks. The Seventh Circuit observed that Petitioner had presented no direct evidence of discrimination only after having found that Petitioner could not make out his claim under the *McDonnell Douglas* indirect evidence formula because he had failed to present legally sufficient evidence of pretext. Nowhere in its decision did the court below suggest that it would have set aside a verdict for Petitioner, had he presented evidence of a substantial disparity in qualifications, because of his failure to come forward with direct evidence of discrimination.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH A DECISION OF ANY OTHER UNITED STATES COURT OF APPEALS.

As the Seventh Circuit's decision recites — and as the Petition implicitly acknowledges — the court of appeals' ruling concerning the weight to be given comparative qualification evidence is in harmony with decisions from virtually every circuit. The court below relied on a series of decisions from the Second, Fifth, Tenth, Eleventh, and D.C. Circuits in formulating its holding. Pet. App. 18a-20a. The Petition candidly acknowledges that a similar rule has been adopted by the First Circuit as well.[11]

Although the precise articulation of the standard varies in an immaterial fashion in these decisions,[12] each is predicated

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11. Petition at 15-16, citing *Ruiz v. Posadas de San Juan Assocs.*, 124 F.3d 243, 251 (1st Cir. 1997) ("[I]t cannot be said that [the decision to hire another candidate rather than plaintiff] was so absurd as to defy rational belief."); *Lehman v. Prudential Ins. Co. of Am.*, 74 F.3d 323, 329 (1st Cir. 1996).

12. *See, e.g., Fischbach v. District of Columbia Dept. of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (permitting an inference of discrimination "if the employer made an error too obvious to be unintentional"); *Simms v. Oklahoma ex rel. Dept. of Mental Health &* (Cont'd)

on a common, fundamental understanding: In a case where there is no manifest disparity between the qualifications of the plaintiff and those of the selected candidate, a jury's conclusion that the plaintiff was better qualified, *by itself*, cannot support a conclusion that the employer's claim to have selected the person it believed to have been the better candidate is false, much less an inference of intentional unlawful discrimination. In other words, absent other credible evidence, whether direct or circumstantial,[13] that the employer's true reason for rejecting the plaintiff was his race, a finding for the plaintiff cannot be predicated simply on the fact-finder's second-guessing of the employer's assessment of the candidates' relative qualifications.

At pages 10-13 of the Petition, Petitioner suggests that the decision below is in conflict with decisions from the

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(Cont'd)

Substance Abuse Servs., 165 F.3d 1321, 1330 (10th Cir.) (denying such an inference if "neither [candidate] is clearly better qualified"), *cert. denied*, 528 U.S. 815 (1999); *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001) (allowing such an inference if there is "a strong showing of a disparity in qualifications"); *Deines v. Texas Dept. of Protective & Regulatory Servs.*, 164 F.3d 277, 279 (5th Cir. 1999) (allowing an inference only where "there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue").

13. Nothing in the Seventh Circuit's decision — or in the decisions of the other circuits on which it relied — supports Petitioner's hyperbolic interpretation of the court's holding that, "so long as a rational employer might have rejected the plaintiff, the discrimination claim will fail unless the employer was so inept as to leave a smoking gun of direct evidence." Petition at 15. Indeed, as this Court explained in *Patterson*, 491 U.S. at 188, "There are certainly other ways [other than relying on a comparison of qualifications] in which petitioner could seek to prove that respondent's reasons were pretextual." Such evidence can be either direct or circumstantial in nature.

Eighth, Ninth, and Third Circuits.[14] Petitioner's analysis is predicated on the flawed assertion that the Seventh Circuit has "[e]ffectively [b]ar[red]" or "largely prohibited" the use of comparative qualifications evidence in proving discrimination (Petition at 13), while the Eighth, Ninth, and Third Circuits uncritically have relied on such proof. In truth, the decisions of these latter circuits are in harmony with the Seventh Circuit's decision below.

Petitioner incorrectly describes *Chock v. Northwest Airlines*, 113 F.3d 861 (8th Cir. 1997), as a case in which the Eighth Circuit reversed a district court decision because of the lower court's failure to consider comparative qualifications evidence. Petition at 10. In fact, the Eighth Circuit *affirmed* the summary judgment entered for the employer. 113 F.3d at 866. The court of appeals acknowledged that comparative qualifications evidence "'could reasonably lead a trier of fact to infer that Defendant's proffered reasons were pretextual'" (*id.* at 864, *quoting Hase v. Missouri Div. of Employment Sec.*, 972 F.2d 893, 897 (8th Cir. 1992), *cert. denied*, 508 U.S. 906 (1993)), and that, "if such a comparison were to successfully challenge the employer's articulated reason," it could support a reasonable inference that discrimination was the motivating reason for the decision. *Ibid.*, *citing Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir.) (*en banc*), *cert. denied*, 521 U.S. 1119 (1997). But, having confirmed the potential relevance of evidence of comparative qualifications, the Eighth Circuit in *Chock*

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14. Petitioner erroneously asserts that the Seventh Circuit's 6-5 vote on the petition for rehearing *en banc* demonstrates a split on that court that "reflects a similar conflict among the courts of appeals." Petition at 6. The fact that five active Seventh Circuit judges felt this case merited *en banc* consideration is no more indicative of how those judges would have voted on the merits than is a dissent by a member of this Court from an order denying a petition for a writ of certiorari.

then addressed under what circumstances such an inference fairly could be drawn — when such a comparison would "successfully challenge the employer's articulated reason" — and concluded, consistent with the Seventh Circuit decision herein, "[A] comparison that reveals that the plaintiff was *only similarly qualified* or not as qualified as the selected candidate would *not* raise an inference of racial discrimination." *Ibid.* (emphasis added), *citing Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1309-11 (8th Cir. 1995). *See also Pierce v. Marsh*, 859 F.2d 601, 604 (8th Cir. 1988) ("The mere existence of comparable qualifications between two applicants, one black male and one white female, alone does not raise an inference of racial discrimination."), on which the Eighth Circuit relied in *Chock*, 113 F.3d at 864.[15]

Nor is there conflict between the Seventh Circuit's decision and that of the Ninth Circuit in *Odima v. Westin Tucson Hotel Co.*, 991 F.2d 595 (9th Cir. 1993), cited at page 11 of the Petition. The district court in that case had entered judgment for the plaintiff based on its finding that the employer had not proven that the successful applicants were "clearly superior" to Odima. *Id.* at 599. The Ninth Circuit ruled that the district court had erred, *inter alia*, in placing the burden on the employer to prove that the selected candidates were better than the plaintiff and instructed the district court on remand to compare the qualifications of the plaintiff and the successful candidates.

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15. In *Hase*, 972 F.2d at 897 (Petition at 11), the Eighth Circuit vacated the employer's summary judgment and remanded for trial because the disparity between the qualifications of the plaintiff and those of the successful applicant was so great that it indicated the existence of a genuine issue of material fact, particularly where "the relative merit of each party's case depends significantly on credibility." The decision in *Hase* is hardly inconsistent with the Seventh Circuit's post trial decision in the instant case.

But, in language that echoes the analysis of the Seventh Circuit in the instant case, the Ninth Circuit cautioned:

> The district court must not substitute its own judgment about whether the employment decisions were wise, or even fair, for that of the employer. *The closer the qualifications of the candidates, the less weight the court should give to perceived differences in qualifications* in deciding whether the proffered explanations were pretextual.

Id. at 602 (emphasis added).

Finally, there is no conflict between the Third Circuit decision on which Petitioner relies at page 12 of the Petition — *Seaman v. Coplay Cement Co.*, 26 F.3d 428 (3d Cir. 1994) — and the Seventh Circuit decision below. In *Seaman*, an older employee complained that he had been laid off as part of a reduction-in-force while younger workers had been retained, in violation of the ADEA. The Third Circuit vacated a judgment in favor of the plaintiff because of an error in the jury instructions and remanded for a new trial. *Id.* at 438-39. The court had no reason to engage in an extended discussion of the plaintiff's comparative qualifications evidence. In ruling that the employer had failed to demonstrate that the trial court should have granted it judgment as a matter of law, the court of appeals observed that Seaman had introduced evidence that the employer's explanation for the plaintiff's layoff (that sales to house accounts would be handled by the company's chief operating officer and vice-president of sales, rather than by the members of its sales force) was false. *Id.* at 433. Accordingly, the court concluded that there were "factual issues requiring a credibility assessment by the trier of fact. . . ." that made the entry of judgment as a matter of law inappropriate. *Ibid.*

In passing, the court also observed that Seaman had introduced evidence that he had more experience in the cement industry and was "more qualified" than some of the younger salesmen who had been retained. *Ibid.* But, the Third Circuit did not describe this evidence, which may well have reflected such a significant disparity in qualifications as to pass muster under the Seventh Circuit's standard. Accordingly, nothing in *Seaman* suggests that the mere presence of *any* difference in the qualifications between a plaintiff and another candidate, *by itself*, can support a jury verdict of intentional discrimination, the rule espoused by Petitioner.

In conclusion, the decision below simply reflects an unexceptional application of the standard that the circuits uniformly have developed to assess the probative value of comparative qualifications evidence. Review by this Court would serve no purpose.

III. THE DECISION BELOW IS CONSISTENT WITH THE PURPOSES AND POLICIES OF THE FEDERAL EQUAL EMPLOYMENT OPPORTUNITY STATUTES.

The Petition should be denied for the further reason that the decision below is fully consistent with the underlying purposes and policies of Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1981, the statutes on which Petitioner based his promotion discrimination claim, as well as the other equal employment opportunity statutes listed at page 24 of the Petition.

Title VII does not require an employer to grant preferential treatment to minorities or women. *McDonnell Douglas*, 411 U.S. at 800. *See* 42 U.S.C. § 2000e-2(j). The statute was not intended to "diminish traditional management prerogatives." *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979). Among those traditional prerogatives is the employer's right to judge

for itself which of two candidates is better-qualified for a position. Absent probative evidence of a discriminatory motivation, "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability[.]" *Burdine*, 450 U.S. at 259. In *Burdine* this Court expressly rejected an interpretation of Title VII that would have required an employer "to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. . . . Title VII does not obligate an employer to accord this preference." *Ibid.*

Allowing a jury to conclude that an employer has engaged in intentional discrimination simply based on the jury's second-guessing of the employer's assessment of candidates' relative qualifications under circumstances such as those present here would be contrary to these fundamental principles, as the Seventh Circuit recognized in its decision.

> [A] court's "role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second-guesses employers' business judgments." *Simms*, 165 F.3d at 1330. . . . If we were to allow a jury to evaluate competing credentials to determine whether the employer's assertion that it selected the best candidate was pretextual, the jury would in most cases be replacing the employer's personnel department.

Pet. App. 21a. There is neither logical nor legal justification for a rule that would allow a jury to find that an employer's explanation that it selected the person it judged to be the superior candidate was a lie simply because the qualifications of the plaintiff and the selected candidate differ in some respects and the jury, in its own judgment, ranks the candidates differently — much less a rule that would permit such a finding

to serve as a basis for an inference that the employer's true motivation was unlawful racial discrimination.

If employers know that a jury verdict of intentional discrimination based solely on insubstantial differences in candidate qualifications — based on the jury's "second-guessing" of the employer's judgment — cannot be overturned, employers will be forced to give preference to protected-group candidates whenever their qualifications are not manifestly inferior to candidates the employers prefer for nondiscriminatory reasons. This is precisely the outcome that this Court rejected in *Burdine* as antithetical to the underlying purposes of Title VII.

Petitioner complains that the standard that the courts uniformly apply is somehow "asymmetric," that "employers may defeat discrimination claims by proving that the plaintiff was comparatively *less* qualified, but plaintiffs (generally) cannot support such claims by demonstrating that they were *more* qualified." Petition at 13 (emphasis in original). The flaw in Petitioner's analysis is palpable. It ignores both that it is the plaintiff who bears the burden of persuasion, not the employer, and that the ultimate issue on which he bears that burden is whether the employer's choice of the other person was because of the plaintiff's protected status, not whether the selectee was or was not the "better-qualified" candidate. If an employer proves that the plaintiff in fact was less-well qualified, and the plaintiff has offered no direct or circumstantial evidence of discrimination other than the mere disparity in qualifications (*see Patterson*, 491 U.S. at 188), there is simply no basis for a finding that the employer has violated Title VII. On the other hand, a jury's conclusion that the plaintiff was better qualified than the individual selected will not logically support a finding that the employer's explanation that it selected the superior candidate was a lie — much less an inference that the true reason was an

unlawful one — unless the disparity in qualifications is so manifest that the possibility that the employer and the jury simply have a good-faith disagreement over the identity of the better candidate can be excluded.

Ultimately, Petitioner's complaint with the decision below is that few if any plaintiffs supposedly will be able to prove claims of promotion discrimination under the standard applied in this case and that some plaintiffs will fail to prevail even though they "might well have been more qualified than the individual who was actually awarded the position in question." Petition at 18.[16] Title VII prohibits an employer from discriminating against a plaintiff because of his race — it does not penalize an employer for having made an erroneous or even a foolish assessment of candidate qualifications. *Burdine*, 450 U.S. at 259.

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16. Indeed, Petitioner asserts at page 13 of his Petition that, "among the scores of such decisions there appears to be only a single case in which a plaintiff succeeded in meeting this strict standard." *See also* Petition at 18. Petitioner does not purport to have surveyed all of the employment discrimination cases that have gone to judgment since 1964, much less those cases that have been settled where a disparity in qualifications was the only evidence the plaintiff possessed. Accordingly, his assertion, based on his review of a limited number of reported decisions, is simply meaningless. Moreover, the fact that there have been many instances in which the plaintiff's evidence of discrimination has been found to be insufficient says nothing concerning the correctness of those decisions or their fealty to the policies that underlie the equal employment opportunity statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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